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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

10-288

JAMES RAY WARD,
Petitioner,

versus,

STEVEN UPTON, WARDEN,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW Respondent JAMES RAY WARD, and pursuant to Sup. Ct. Rule 39, moves for leave to proceed in forma pauperis.

1) Mr. Ward was determined indigent by the United States District Court for the Northern District of Georgia. On May 3, 2004, pursuant to 28 U.S.C. §848(q), counsel was appointed to represent Mr. Ward in all stages of his habeas corpus proceedings.

2) Mr. Ward remains indigent and wishes to file a response to the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit which has been filed by Petitioner.

WHEREFORE, Mr. Ward asks this Court to grant his motion and allow him to proceed in forma pauperis.

Dated this 28thday of October, 2010.

Respectfully submitted,

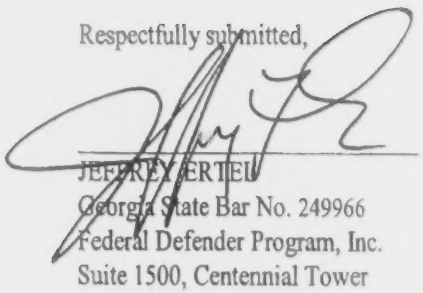

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE PETITION 9

I. Hall Invests Factual Findings Not Made by the Stat Habeas Court and Omits Reference to His Multiple Opportunities to Develop the Record In State Court 9

A. No Findings Can Be Made When No Evidence Is Considered 9

B. Hall Declined to Present Evidence in State Court 12

II. Hall Misstates Georgia Law and Presents No Issue Worthy of Certiorari 12

III. Hall's Complaint's About the Eleventh Circuit's Application of *Frady* Provide No Basis for Granting the Petition 15

A. Georgia's Requirement That any Alleged Error Be Raised On Direct Appeal Was Applied in a Novel Manner Given Existing Precedent At The Time Of Ward's Direct Appeal; Ward Would Be Entitled to Relief Regardless Of the Lower Court's *Frady* Analysis 15

B. The Eleventh Circuit's *Frady*-Prejudice Analysis Did Not Violate This Court's Precedent Or Conflict With That Of Other Circuit Courts 17

CONCLUSION 19

TABLE OF AUTHORITIES

SUPREME COURT CASES:

Cone v. Bell, 129 S.Ct. 1769, 1782 (2009) 16

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958) 16

Simmons v. South Carolina, 512 U.S. 154 (1994) 15

United States v. Frady, 456 U.S. 152, 170 (1982) 8,15,17,19

STATE COURT CASES:

Berryhill v. State, 221 S.E. 2d 185, 189 (Ga. 1975) 14

Childs v. State, 357 S.E. 2d 48, 60 (Ga. 1987) 14

Cohen v. State, 361 S.E. 2d 373, 375 (Ga. 1997) 14

Hollis v. State, 382 S.E. 2d 145 (Ga. 1989) 13

Potts v. State, 410 S.E. 2d 89, 97 (Ga. 1991) 14

Quick v. State, 353 S.E. 2d 497, 503 (Ga. 1987) 11,13,14

Thacker v. State, 173 S.E. 2d 186, 193 (Ga. 1970) 14

Turpin v. Todd, 268 Ga. 820, 828 (1997) 7,13,16

Turpin v. Todd, 519 S.E. 2d 678, 683 (Ga. 1999) 14

STATUTORY PROVISIONS:

Title 28 U.S.C.

§ 2254(d) 9

§ 2254(e)(1) 9,14

MISCELLANEOUS:

O.C.G.A. § 9-14-48 2

O.C.G.A. § 9-14-48(d) 15,16

O.C.G.A. § 17-10-30(b)(1);(2) 2

O.C.G.A. § 17-10-30(b)(2) 2

O.C.G.A. § 17-10-30(b)(7) 2

INTRODUCTION

Petitioner Hall seeks review of the unremarkable decision by the United States Court of Appeals for the Eleventh Circuit finding misconduct by the jury/bailiffs during the sentencing phase of Respondent Ward's capital trial and concluding that the misconduct required a grant of habeas relief. Hall's petition is premised in large part on claimed factual findings by the state habeas court that were in fact never made. In addition, Hall complains that the record has not been fully developed without acknowledging the multiple opportunities he was provided by the state court to submit evidence to counter Ward's allegations. Furthermore, Hall's petition misrepresents both Georgia law and the Eleventh Circuit's ruling. When the actual state record is considered, in the context of accurate Georgia law, the Eleventh Circuit's decision is unremarkable and does not present any issue worthy of this Court's attention. Finally, Ward would be entitled to relief even if this Court were to grant Hall's petition.

STATEMENT OF THE CASE

A. Conviction and Death Sentence.

Ward was convicted of abducting and killing Nikia Gilbreath. She died from asphyxiation resulting from wadded-up paper towels in her throat. R1-30 at 2583-84. At the time of her death, Mrs. Gilbreath was approximately five months pregnant and the fetus did not survive. *Id* at 2317; 2604. The state's pathologist acknowledged the death might have been accidental as the paper could have been placed in Mrs. Gilbreath's mouth to keep her from shouting and she panicked and swallowed the paper. *Id* at 2606; 2607. During the sentencing phase, the prosecution invoked three statutory aggravating factors: (1) the murder was

committed by a person with a prior record of conviction for a capital felony (O.C.G.A. § 17-10-30 (b)(1))[1]; (2) the murder was committed while the offender was engaged in the commission of another capital felony (O.C.G.A. § 17-10-30 (b)(2)) - - the kidnapping of Ms. Gilbreath; and (3) the murder "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." O.C.G.A. § 17-10-30(b)(7). Although the jury found that the last aggravator was not applicable, the jury recommended that a sentence of death be imposed.

B. Allegations and Evidence of Jury/Bailiff Misconduct in State Habeas Proceedings.

1. Jurors Asked About Parole.

After Ward's conviction and sentence were affirmed on direct appeal, he filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. Ward alleged, inter alia, that improper communications had occurred between the bailiff and the jury concerning the subject of parole in violation of the right to be tried by an impartial jury. As proof of his allegations, he presented affidavits from several jurors, as permitted by Georgia law.[2] Juror Kenneth Craig, for example, admitted in his affidavit that he personally questioned a bailiff about parole-related issues during deliberations:

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[1]This "prior" record concerned an abduction/rape that occurred after Ms. Gilbreath's death.

[2]O.C.G.A. § 9-14-48. *See also* R1-6, Exh. 59 at 12 (state habeas court agrees with Ward's explanation that "the affidavit provision in the habeas statute is intended to benefit indigent petitioners who don't have the resources to bring all these witnesses in here, to pay their fees," and that the State had the resources necessary "to conduct depositions of witnesses whose affidavits are presented by the petitioner in this case."); *id.* at 9 (state habeas court acknowledges warden's right to depose Ward's affiants and favors telephonic depositions.)

> One of the things that I know I was worried about was whether [Respondent] would ever be able to get out and do something like this again. I really did not think he deserved the death penalty, partly because I had some strong doubts about his guilt. But I believed at the time – and other jurors shared this belief – that a life sentence meant that he would be able to get out on parole after a while.
>
> Before we sentenced Ward to death, I asked one of the bailiffs – a woman I think – if life and death were our only options. I wanted to know whether life really meant life and, if it didn't mean life, whether there was a life without parole choice. But the bailiff told me that jurors couldn't ask questions like that, that the judge's instructions were what we had to go on. I never got an answer to my question.
>
> . . . .
>
> Today I wish that we had had the choice of sentencing Ward to life without the possibility of parole. I know that if we had had that choice, I would definitely have voted for a life sentence, because I just wanted to be sure that a person like him would be off the streets, whether or not he was actually guilty of the crime.

R1-6, Exh. 65 at 882-83.

Juror Keith Dunsmore also swore that jurors had contact with a bailiff concerning parole eligibility:

> Other jurors also had some uneasiness with the death penalty in this case. We certainly did not want Mr. Ward to be out on the street. I remember that we asked a bailiff whether we could sentence Mr. Ward to life without the possibility of parole. The bailiff returned with the answer that such a sentence was not an option. If the life without parole option had been available at the time, I and other jurors may well have decided that this was the appropriate sentence.

Id. at 888. Finally, Juror James Hix confirmed the importance the issue of parole played in the sentencing decision:

> One of the things I and the other jurors were especially concerned about was the possibility that Mr. Ward might get out of prison someday and commit another violent crime. We just didn't think that a life sentence truly meant life, and that he would eventually get out of prison. If we had had the option of life without the possibility of parole as a sentence, I would have seriously considered a life sentence.

Id. at 885-86. It is clear that "the jury questioned a bailiff about the possibility of sentencing

Ward to life without parole, and that the answer was not given in open court." App. at 63.

2. Hall's Multiple Opportunities to Present Evidence.

Initially, the state habeas court agreed with Hall that juror affidavits could not be considered under a Georgia statute precluding jurors from impeaching a verdict. R1-6, Exh. 59 at 23-24.[3] Hall later noted that he had subpoenaed jurors to rebut Ward's evidence and he asked for the opportunity to proffer their testimony in case Ward challenged the state habeas court's admissibility ruling on appeal. *Id.*, at 34-37. The state habeas court acquiesced to Hall's suggestion that Ward not be permitted to even proffer his affidavits, thereby obviating the need for Hall to submit rebuttal evidence. *Id.* at 37.

The state habeas court later revised its ruling about evidence from jurors and at the end of the October 21, 1997 hearing admonished Hall that he had until December 1, 1997 to submit affidavits from jurors. R1-6, Exh. 63 at 696. Hall responded by asking that he be allowed to call jurors at the upcoming December 22nd hearing on Ward's *Brady v. Maryland* claims. In the alternative, Hall requested permission to depose jurors. *Id.* at 697. The state habeas court, at that time, declined to hear live testimony from the jurors but ruled, "***depositions or affidavits. It's up to you.***" *Id.* at 698 (emphasis added).

Prior to the December 22, 1997 hearing, the issue of testimony from jurors was revisited. The state habeas court had decided, "in an abundance of caution," to allow Hall to bring in jurors for live testimony. R1-6, Exh. 64 at 703. Later, but before December 22nd, the state habeas court

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[3]The court also believed that the affidavits were not relevant. Regarding the bailiff-jury contact, the court stated: "the discussion with the Bailiff, as stated by the jurors, is not the sort that – perhaps it should have been reported to the judge, and then from the judge to the lawyers, but the deputy's response was a proper response, and no harm done." R1-6, Exh. 59 at 24.

reverted to its earlier decision not to consider Ward's affidavits. It nevertheless ruled that Hall could attempt to rebut Ward's allegations by submitting "affidavits also not to be considered, but put in as part of the record." *Id.* Hall was charged with contacting the subpoenaed parties to inform them that their live testimony would not be needed. *Id.* Because Hall was unable to reach Juror Dunsmore before the hearing, the state habeas court ruled "rather than just have him sign an affidavit and turn around and go home," the court would allow Hall to ask Dunsmore under oath "basically the same questions that would appear on the affidavit . . .." *Id.* at 703-04.[4]

Although Hall had missed the deadline for submitting rebuttal affidavits or depositions, the habeas court stated that it would nevertheless allow them in the record if they were received by the court "soon." *Id.* at 705. When extending the deadline, the habeas court explained that any juror affidavits would not "be part of the record I'm going to review, it is only to be there in the record in case at some later date an appellate court thinks it needs to have those." *Id.* Before Dunsmore testified, the habeas court reiterated that no juror statements would be considered in ruling on Ward's habeas petition:

> [N]one of these affidavits, I want to make it clear, either [Ward's] or [Hall's] or the testimony that we are about to take under oath, are going to be considered by me at this point.

Id. at 707; *see also id.* at 707-08 (the juror-related evidence "will be part of the record, not that I'm going to consider, but will be part of the record kept by the Court Reporter.") Ward's juror affidavits were then placed into the record.

When Dunsmore testified, he was asked about the statement in his declaration about the

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[4]Hall had subpoenaed three of the bailiffs along with the three jurors who had provided affidavits to Ward. R1-6, Exh. 64 at 706. Juror Craig arrived prior to the hearing and was told by Hall that he was not needed to testify. *Id.* at 705–06.

jurors asking the bailiff whether Ward could be sentenced to life imprisonment without the possibility of parole. He responded that he could no longer recall whether the bailiff was asked the parole question or whether the question was posed to fellow jurors. *Id.* at 721 and 723. Although Dunsmore also could not recall if he was the one who specifically asked about parole options, he did remember that the jurors discussed the issue and "found out that we couldn't do it, as a jury we couldn't do it." *Id.* at 722-23. Regarding asking questions of the bailiffs, Dunsmore recalled that the bailiffs would leave the room with the question instead of attempting to answer it themselves. *Id.* at 723. At the time of the hearing, Dunsmore recalled only one specific occasion where a question was given to a bailiff although he thought there could have been a couple of others. *Id.* at 724-25. On that occasion, the jurors could see the bailiffs take the question to the judge's chambers. When they returned, they informed the jurors that the response was from the judge. *Id.*[5]

3. The State Habeas Court's Ruling – Evidence Excluded.

In its August 27, 1998 order denying Ward's habeas petition, the state habeas court ruled that the bailiff-jury misconduct claim was procedurally barred because Ward had failed to raise the issue on direct appeal. App. 175. The habeas court did not address whether Ward had established cause for his default, instead ruling that Ward did not show prejudice as needed to overcome the bar. This finding of no prejudice included no analysis. *Id.* The habeas court also

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[5]The record shows that the jury made several requests during deliberations that were relayed to the trial court and discussed with counsel prior to the trial court acting on the requests. R1-30 at 4841 (juror requests latex gloves); R1-30 at 4855 (jury requests a tape recorder); R1-30 at 4857-60 (jury requests definition of malice.) It was only when the trial court answered the malice inquiry that the jurors were brought into open court for the response.

found, again without explanation, that Ward failed to satisfy the Georgia miscarriage of justice exception to the procedural default rule. *Id.* at 175-176. On appeal, the Georgia Supreme Court remanded the case for further findings on other issues. App 162-163. On remand, the habeas court clarified its prior ruling that Ward's juror-related claims[6] had no merit. App. 166-67. It found that Ward had not met the "cause" requirement to overcome the procedural default of any of the bailiff/juror claims:

> Petitioner has failed to establish: (1) an external factor precluding Petitioner from previously raising [subclaims (a)-(c)], or (2) ineffective assistance of counsel given that Petitioner has not established the "cause" to overcome the procedural default of this claim as he has failed . . . to establish that the bailiffs engaged in any conduct that resulted in "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin v. Todd*, 268 Ga. 820, 828 (1997). There is no affirmative evidence that the bailiff oath was not taken, that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support Petitioner's allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge.

Id. The Georgia Supreme Court denied Ward's application to appeal this ruling.

C. The Eleventh Circuit's Decision.

Ward filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia alleging multiple claims for relief. After his petition was denied, he appealed. The Eleventh Circuit affirmed the denial of relief on all but the juror/bailiff misconduct claim.

As for that claim, the Eleventh Circuit rejected Ward's argument that the state procedural

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[6]There were three claims related to misconduct or error concerning the jurors and/or bailiffs. Subpart (c) is the claim on which the Eleventh Circuit found Ward entitled to habeas relief. Subparts (a) and (b) involved the familiarity between the bailiffs and jurors and a failure to administer and comply with the bailiff oath. Subparts (a) and (b) are not at issue here.

bar was not adequate to preclude federal habeas review. App. at 60-61. The appeals court found, however, that Ward had demonstrated "cause" to overcome the procedural default. App. at 62. It ruled that there was an external impediment that impeded Ward from raising the claim during the direct appeal – "the failure of the bailiff and/or the trial judge to inform Ward or his counsel about the jury's question concerning parole." *Id.*

Regarding the state habeas court's finding that there was no evidence that the jury asked any question that was not answered by the trial court in open court, the Eleventh Circuit held that this finding was rebutted by clear and convincing evidence, i.e., the juror affidavits and Dunsmore's testimony. App. at 63-64. The appeals court also found that the state habeas court's refusal to consider Ward's juror evidence was erroneous in light of Georgia Supreme Court precedent. App. at 65.

Turning to the prejudice prong of the "cause and prejudice" exception to the procedural default doctrine, the Eleventh Circuit ruled that Ward met the test of *United States v. Frady*, 456 U.S. 152, 170 (1982). In reaching this conclusion, the appeals court noted how important the question of parole was to at least three of the jurors, how the bailiff's answer to the jurors necessarily reinforced a preexisting belief that Ward would be paroled at some future time, the fact that parole eligibility was not a proper consideration under state law, and that only a single vote in favor of life imprisonment was needed to avoid the death penalty. App. at 67-71.

Having overcome the procedural bar, the Eleventh Circuit lastly ruled that Ward was entitled to relief on the merits of his claim. It reached this conclusion after considering the nature of the extrinsic evidence, the manner in which the extrinsic evidence reached the jury, and the strength of the government's case. App. at 72. As for the last factor, the appeals court noted the

circumstantial nature of the case against Ward, the doubts about Ward's guilt expressed by some of the jurors, and the jury's rejection of the aggravating factor of an outrageously or wantonly vile murder. App. at 72-73.

REASONS FOR DENYING THE PETITION

I. Hall Invents Factual Findings Not Made By the State Habeas Court and Omits Reference to His Multiple Opportunities to Develop the Record in State Court.

A. No Findings Can Be Made When No Evidence is Considered.

Hall complains that the Eleventh Circuit failed to consider that Ward did not overcome by clear and convincing evidence the state habeas court's finding "that the trial court, via the bailiff, informed the jury that they were to rely on the trial court's proper instructions, which was not an improper procedure under Georgia law." Cert. Pet. at 9; *see also Id.*, at 10 ("the Eleventh Circuit erred in not presuming, as found by the state habeas court, that the trial court, through the bailiff, answered any question posed by the jury concerning the possibility of parole."); *id.*, at 14 ("Eleventh Circuit failed to give the mandated presumption under § 2254(e)(1) to the state habeas court's factual finding that the trial court properly answered any question by the jury concerning parole.") Hall's argument is specious on several levels.

First, the assertion that there were such findings by the state court is inconsistent with Hall's admission that 28 U.S.C. § 2254(d) is inapplicable because the bailiff/juror misconduct claim was not "adjudicated on the merits." Cert. Pet. at 10.

Second, the record conclusively establishes that the state habeas court never made any findings. The state habeas court could not have been clearer that it was not going to review or consider any of Ward's juror affidavits, the testimony of Juror Dunsmore, or any counter

depositions or affidavits submitted by Hall. Indeed, Hall repeatedly acknowledges the state habeas court's steadfast refusal to consider the evidence.[7] Despite this acknowledgment, Hall manufactures a factual finding purportedly made by the state court based on evidence it would not consider. The Eleventh Circuit cannot be criticized for withholding deference to a nonexistent finding.

Third, because the state habeas court refused to consider the pertinent evidence it is unsurprising that it wrote that there was "no evidence that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support [Ward's] allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge." App. at 167. Hall surprisingly attempts to support this with the very evidence the state habeas court ruled it would not consider. *See* Cert. Pet. at 8-9 (the above finding was supported by "evidence that showed that the bailiff took the jurors' question to the judge for the judge's response. The bailiff then returned from the judge to give the judge's response that the jury had to proceed with the instructions previously given to them by the trial court . . ."). In addition to being nonsensical, the evidence that was not considered by the state court simply does not show what Hall contends it does.

For example, Hall's rendition of what occurred ignores Craig's affidavit in which he

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[7] *See* Cert. Pet. at 5 ("The Eleventh Circuit relied . . . on testimony that was not allowed in the state courts"); *Id.* at 6 (Eleventh Circuit based its prejudice determination on testimony of three jurors which was "not in evidence before the state habeas court"); *id.* at 12 (Eleventh Circuit relied on "the affidavits and testimony of the jurors that were not admitted"); *id.* at 15 ("the state habeas court held that it was not admitting into evidence or considering the testimony of jurors for its review"); *id.* at 20 (Eleventh Circuit's findings were "based on testimony that was not admitted in the state court proceedings"); Cert. Pet. at 20 ("the state habeas court made it clear that it was not considering jury testimony on the issue.)

stated that the bailiff refused to convey the parole question to the trial judge. And while Dunsmore's affidavit recounted the bailiff being asked about parole and returning with an answer to the question, at the hearing he could not recall whether the question about parole was actually asked of the bailiff or was brought up by a fellow juror. Although he could recall one specific instance where a jury question was presented to the judge, this recollection was never tied to the parole question. Hall is incorrect when he claims that Dunsmore "could recall the jury asking *only this one question*." Cert. Pet. at 10 (emphasis in original).

Hall's contention that "the reasonable conclusion" is that the parole question was taken to the trial judge and answered by the court is further undermined by the absence of any evidence in the trial record of the question. There is, of course, a presumption that the trial court would have acted appropriately upon receipt of such a question, "i.e., [it] would have put the inquiry on the record, consulted with counsel, formulated a *Quick* [*v. State*] response, and personally conveyed that response to the jury in the courtroom" *Turpin v. Todd*, 519 S.E.2d 678, 681 n.2.[8] That the trial court responded appropriately to other jury questions is additional rebuttal to Hall's version of events. Hall essentially asks this Court to presume that the trial court disregarded its duty of notifying opposing counsel of the jury's query, as well as of the trial court's proposed response,

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[8]Under state law at the relevant time, if jurors asked about parole during a capital trial the trial courts were to respond as follows:

> You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whatever it may be, will be carried out.

Quick v. State, 353 S.E.2d 497, 503 n. 3 (Ga. 1987). This rule changed after Georgia adopted a third possible sentence in capital cases – life imprisonment without the possibility of parole.

and instead provided the jury with a secret and legally inappropriate answer. There is no basis for such a presumption.

B. Hall Declined to Present Evidence in State Court.

Hall also accuses the Eleventh Circuit of disregarding "the fact that the state habeas court had not allowed development of the claim by either party." Cert. Pet. at 3-4.[9] The state court record is clear, however, that Hall was well aware of the need to submit any rebuttal evidence he could develop to counter Ward's affidavits and the testimony of Dunsmore. And although Hall did submit affidavits following the December 22, 1997 hearing to counter Ward's *Brady* claim (*see* R1-6, Exh. 66 at 1303-1310), notably he presented nothing to refute Ward's evidence of juror/bailiff misconduct. Given that the state habeas court authorized Hall to conduct depositions of the jurors, as well as to proffer affidavits from them in case the state habeas court's admissibility ruling was overturned on appeal, Hall's contention that the state habeas court's refusal to consider Ward's evidence left him with no evidence to rebut (Cert. Pet. at 20) is simply untrue.

II. Hall Misstates Georgia Law and Presents No Issue Worthy of Certiorari.

Although Hall does summarily assert that the jury/bailiff evidence was "not admissible," (Cert. Pet. at 6), he does not defend the state habeas court's admissibility ruling which the Eleventh Circuit correctly found was contrary to Georgia law. App. at 65-66. Hall does take

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[9] *See also* Cert. Pet. at 5 ("[t]he Eleventh Circuit relied on an undeveloped record"); *id.* at 6 (Eleventh Circuit decided claim "on a record that had not been developed in the Court below."); *id.* at 9 ("Disregarding the fact that the record was undeveloped on the issue and that the state habeas court had refused to allow development of the issue . . .."); *id.* at 12 (record "is undeveloped on exactly what the jurors were told."); *id.* at 15 (Eleventh Circuit relied on "undeveloped testimony"); *id.* at 20 (Eleventh Circuit relied on "undeveloped evidence"); *id.* at 21 (asking this Court for a remand "for further development of the facts").

issue, however, with the Eleventh Circuit's reading of Georgia law regarding the appropriate response to jury questions about the possibility of parole in capital cases arising before Georgia adopted a life without parole sentencing option. According to Hall, under "well-substantiated Georgia law . . . it is not harmful error, or even a jury charge, if the bailiff under instruction of the trial court merely informs the jury that they must proceed under the instructions previously given by the trial court." Cert. Pet. at 11-12. As set forth above, there is no finding that the trial court answered the jury's question about parole through the bailiff. In addition, the cases cited by Hall do not support his position.

The Georgia Supreme Court in *Quick* announced a rule requiring a specific response to questions about parole in capital cases:

> You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whatever it may be, will be carried out.

Quick, 353 S.E.2d at 503 n. 3 (Ga. 1987). It is undisputed that Ward's jury was not provided such an instruction following the query about whether Ward could be paroled. Hall's citation to *Quick* (Cert. Pet. at 12) as supporting authority is mysterious. So too is Hall's reliance on *Todd*, 519 S.E.2d at 683. Although the Georgia Supreme Court did note there that it is generally harmless error where a bailiff simply repeats what a trial court has instructed the bailiff to tell the jury in response to a jury question, the Georgia Supreme Court cited to *Hollis v. State*, 382 S.E.2d 145 (Ga. 1989). *Hollis* was a non-capital case where the trial court informed the parties about a jury query and developed a response that the parties agreed to. Even assuming that the trial court in this case provided an answer to the jury's parole question, an assumption not

supported by the record, defense counsel was not given the opportunity to request that the jury be given the *Quick* admonition as mandated by state law.[10]

Hall not only contends that the Eleventh Circuit misconstrued state law, but also complains about the Eleventh Circuit's "fail[ure] to give the mandated presumption under § 2254(e)(1) to the state habeas court's factual findings that the trial court properly answered any question by the jury concerning parole." Cert. Pet. at 14-15. Again, the state habeas court never made a factual finding that the trial court answered the jurors' question. Nor, necessarily, did it find that any such answer was proper under state law. But even if the state habeas court had made a finding that it was proper under Georgia law to refer the jurors to their original instructions, this is a legal, not a factual, finding and § 2254(e)(1) has no application.

Finally, even if Georgia law permitted trial courts to refuse to address parole-related questions in capital cases, which it did not at the relevant time, this would not be the end of the matter. It would violate due process and the Eighth Amendment to preclude a defendant from presenting evidence or argument about the possibility of parole while at the same time allowing

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[10]In *Potts v. State*, 410 S.E.2d 89, 97 (Ga. 1991), another case cited by Hall (Cert. Pet. at 12 and 13), the Georgia Supreme Court found no reversible error where the trial court declined to answer the jury's question about the possibility of parole. The opinion is silent, however, regarding whether a *Quick* admonition had been requested by trial counsel after being properly informed of the jury question. Because Ward's attorney was not notified about the question he was denied his right to participate "in the trial court's formulation of a response to a jury inquiry." *Turpin v. Todd*, 519 S.E.2d 678, 683 (Ga. 1999). In *Cohen v. State*, 361 S.E.2d 373, 375 (Ga. 1997), again there was no indication in the record whether trial counsel had requested an answer on the parole issue. Further, because the trial in *Cohen* was before *Quick* was decided, it is not surprising that the trial court was not reversed for failing to admonish the jury as was later required by *Quick*. *See also Childs v. State*, 357 S.E.2d 48, 60-61 (Ga. 1987) (decision silent on defense counsel's response to jury inquiry in pre-*Quick* trial); *Berryhill v. State*, 221 S.E.2d 185, 189 (Ga. 1975) (pre-*Quick* decision); *Thacker v. State*, 173 S.E.2d 186, 193-94 (Ga. 1970) (same).

the jury to base its sentence on pure speculation about future release. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding it is unconstitutional for a defendant to receive a death penalty on the basis of information which he had no opportunity to deny or explain.); App 70 (Eleventh Circuit recognizing Ward's constitutional right "to be sentenced by jurors who are free from external influence and who render their verdict solely on the basis of the evidence presented during trial.") Thus, any misconception by the Eleventh Circuit about state law would neither justify certiorari review nor change the result below.

III. Hall's Complaints About the Eleventh Circuit's Application of *Frady* Provide No Basis for Granting the Petition.

Hall contends that the Eleventh Circuit "improperly concluded that [Ward] had established cause and prejudice to overcome his default of his juror/bailiff misconduct claim." Pet. Cert. at 6. In particular, Hall complains about the Eleventh Circuit's prejudice analysis under *United States v. Frady*. Cert. Pet. at 18-19. The *Frady* complaint does not provide a basis for certiorari review. *Frady* should not have been at issue because the Eleventh Circuit erred in finding that the state procedural bar was adequate under this Court's procedural default jurisprudence. And there was nothing inappropriate in the circuit court's application of *Frady*.

A. Georgia's Requirement That Any Alleged Error Be Raised On Direct Appeal Was Applied in a Novel Manner Given Existing Precedent at the Time of Ward's Direct Appeal; Ward Would Be Entitled to Relief Regardless of the Lower Court's *Frady* Analysis.

At the time of Ward's trial and direct appeal, O.S.G.A. § 9-14-48(d) had been construed to bar in habeas proceedings only those claims that were clear on the appellate record but had not been raised on direct appeal. Ward followed existing law and made only arguments on direct

appeal that were based on the trial record. It was not until five years after Ward's conviction and sentence were affirmed that the Georgia Supreme Court ruled for the first time in *Turpin v. Todd*, 493 S.E.2d 900, 905 (Ga. 1997), that § 9-14-48(d) applied to issues not appearing in the record on appeal, such as a claim of jury misconduct.[11] Ward was therefore deprived of notice that he needed to investigate whether any bailiff/jury misconduct occurred prior to the direct appeal.[12]

Because the state habeas court's application of § 9-14-48(d) to the juror/bailiff misconduct claim in this case was novel, the rule was not adequate for purposes of precluding federal habeas review. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) (novelty in procedural requirements cannot be permitted to thwart federal review). Had the Eleventh Circuit properly addressed the procedural default question, a cause and prejudice

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[11]The Georgia Supreme Court went on to find, however, that in such a situation the petitioner had cause to overcome the default because the bailiff concealed the factual basis of the claim from the petitioner and the petitioner had no reason to believe the misconduct had occurred during the course of the direct appeal. *Turpin v. Todd*, 493 S.E.2d at 907. Thus, contrary to the state habeas court's finding that Ward had not show cause for his failure to raise the misconduct on direct appeal, the Georgia Supreme Court has found cause in the exact same situation. Where a state court finds a petitioner has justification for not complying with a procedural rule, such noncompliance cannot be a basis for withholding federal habeas review. *See, e.g., Cone v. Bell*, 129 S.Ct. 1769, 1782 (2009) (when a state court declines to find that a claim has been waived by a petitioner's alleged failure to comply with state procedural rules, federal review is not precluded).

[12]The Warden does suggest that the misconduct claim had been available to Ward on direct appeal because trial counsel had spoken with some jurors following the trial. Cert. Pet. at 8. As trial counsel explained, some jurors contacted him after trial because they wanted to talk about the emotional experience they shared. R1-6 ex 62 at 404-05. The record is devoid of evidence, however, that trial counsel learned of the misconduct during such conversations with jurors. Notably, the Warden was provided with trial counsel's files during the state court proceedings. R1-6 ex 59 at 73. Had there been any indication in the files that trial counsel had discovered the misconduct, surely Hall or Ward would have brought that out either by offering trial counsel's notes in evidence or, at the least, questioning trial counsel about his conversation with one or more jurors during the habeas hearing.

analysis would not have been required and *Frady* would have been inapplicable.

B. The Eleventh Circuit's *Frady*-Prejudice Analysis Did Not Violate This Court's Precedent or Conflict With That of Other Circuit Courts.

Under *Frady*, the question is whether the error worked to the petitioner's actual and substantial disadvantage. *United States v. Frady*, 456 U.S. at 170.

In determining whether Ward established actual prejudice under *Frady*, the Eleventh Circuit observed that at least three jurors expressed concern about whether Ward would be released on parole if he were sentenced to life imprisonment. App. at 67. Their concern was significant enough that a bailiff was asked if Ward could be sentenced to life imprisonment without the possibility of parole. *Id.* at 68. At least one juror was informed by the bailiff that such a sentence was not an option. *Id.* The jury was left with the impression that Ward could or would be released if he was sentenced to life imprisonment.

The Eleventh Circuit found that the bailiff's response to Juror Craig reinforced his belief and that of other jurors that Ward would be paroled after a while. *Id.* The Eleventh Circuit concluded that the issue of parole was not only considered, but was a key factor to the sentencing decision of at least three jurors. *Id.* And although the bailiff's response was technically correct, the Eleventh Circuit noted that the Georgia Board of Pardons and Parole had the discretion to deny parole, a fact not conveyed to the jury. *Id.* at 69 n. 21. More importantly, the Eleventh Circuit pointed out that parole was a subject that was not permitted to play a role in capital sentencing under Georgia law. *Id.* at 70. Where a question about parole was raised, Georgia law required that the jury be told "in no uncertain terms" that parole was not to be a consideration.

On the record before it, the Eleventh Circuit concluded:

> Bearing in mind that only one vote in favor of life imprisonment was needed to avoid a death sentence, we conclude that there is a substantial likelihood that the jury would not have returned a death verdict had the trial court, in lieu of the bailiff's response, properly instructed the jury in open court not to consider parole.

Id.

In his certiorari petition, Hall correctly points out that jurors are generally precluded from testifying about how an extraneous influence operated on his or her mind. Cert. Pet. at 16. This is precisely why there is a certain amount of speculation involved in the prejudice inquiry whenever there is a claim of juror misconduct. Here, neither Ward nor Hall could have asked the jurors the definitive question establishing whether Ward was prejudiced by the misconduct: had you been instructed that the possibility of parole was not to be considered when determining Ward's sentence, would you still have returned a sentence of death? Because this question naturally cannot be asked, a reviewing court is left with whatever objective indicia is available in determining if actual prejudice occurred.

While Hall chastises the appeals court for improperly relying on the "inadmissible thought processes" of some jurors (Cert. Pet. at 15), he fails to specify where in the Eleventh Circuit's decision such error occurred. In this case, consideration of whether the question of parole was a fleeting concern to the jury or whether it constituted a major issue in the sentencing decision was entirely proper.[13] There was nothing in the Eleventh Circuit's analysis that was inconsistent with *Frady*.

Although the heading used by Hall implies that improper use of juror thought processes is

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[13]Similarly, it was not improper for the Eleventh Circuit, when deciding whether habeas relief was warranted, to take into account that the record provided a basis for defense counsel's residual doubt argument and that the argument had some resonance with the jury. App. at 73.

where the Eleventh Circuit went astray under *Frady*, the body of the argument is simply a recapitulation of Hall's baseless contentions that: (1) it was somehow error for the appeals court to rely on evidence that the state habeas court refused to consider; and (2) Dunsmore's testimony established that the trial court answered the jury, and did so in accordance with state law. Hall attempts to elevate the importance of this case by asserting:

> [T]he Eleventh Circuit's reasoning would require reversal in every case in which a juror asked a question of fact or law not in record (sic) in the jury room or to the trial court, even if the juror was properly informed or instructed it could not consider that fact or law.

Cert. Pet. at 19. Here, of course, the prejudice finding was premised on the fact that the jury was *not* informed or instructed that it could not consider the possibility of parole when determining the sentence. Hall has identified nothing in the Eleventh Circuit's analysis warranting certiorari review by this Court.

CONCLUSION

The Eleventh Circuit's decision is unremarkable and Petitioner Hall has failed to provide adequate reasons for this Court to grant his certiorari petition. The petition should therefore be denied.

Dated this 28th day of October, 2010.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2010

10-288

JAMES RAY WARD,
Petitioner,

versus,

STEVEN UPTON, WARDEN,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eleventh Circuit

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon counsel for petitioner by depositing a copy of same in the U.S. mail, with proper postage affixed thereto, addressed to:

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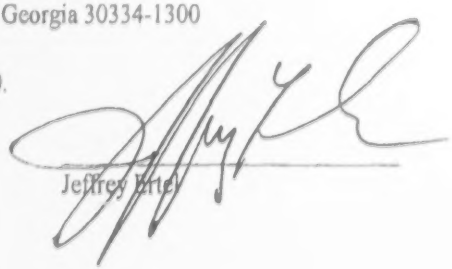
This 28th day of October, 2010.



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